No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether 47 U.S.C. 533(b), which bars local telephone companies from directly providing video programming to subscribers in their telephone service areas, violates the First Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States, the Federal Communications Commission, and Janet Reno, in her official capacity as the Attorney General of the United States, and were defendants in the district court and appellants in the court of appeals. The National Cable Television Association, Inc., an intervenor-defendant in the district court and also an appellant in the court of appeals, is filing a separate petition for a writ of certiorari. Respondents, plaintiffs-appellees below, are The Chesapeake and Potomac Telephone Company of Virgina, Bell Atlantic Video Services Company, Bell Atlantic Corporation, Chesapeake and Potomac Telephone Company, C & P Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Bell Telephone Company of Pennsylvania, and New Jersey Bell Telephone Company.

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The Solicitor General, on behalf of the United States, the Federal Communications Commission, and the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-52a) is reported at 42 F.3d 181. The opinion of the district court (App. 53a-108a) is reported at 830 F. Supp. 909. The Federal Communications Commission's Fourth Further Notice of Proposed Rulemaking (App. 113a-166a), concerning the statutory provision for waivers of the cross-ownership bar, is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1994. Petitions for rehearing were denied

on January 18, 1995. App. 109a-112a. On March 24, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The text of 47 U.S.C. 533(b) is set forth in the Appendix to this petition, 167a-168a.

STATEMENT

1. This case involves a First Amendment challenge to 47 U.S.C. 533(b), a cross-ownership regulation of the market for cable television services that bars local telephone companies (local exchange carriers or LECs) from directly providing video programming, by means of a cable system, to their subscribers in their local service areas. Section 533(b) was enacted as part of Congress's comprehensive regulation of the cable industry in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (Cable Act or 1984 Cable Act); see § 2, 98 Stat. 2785. It is similar to another cross-ownership rule, enacted at the same time, that prohibits local television broadcast stations from owning cable systems in their service areas. See 47 U.S.C. 533(a)(1) (Supp. V 1993). It also stands in a long line of congressional and administrative initiatives to promote diversity of media outlets.[1]

[1] See, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding restrictions on cross-ownership of daily newspapers and broadcast stations); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding regulation prohibiting network ownership of more than one broadcast station in a service area); *United States* v. *Paramount Pictures, Inc.*, 85 F. Supp. 881 (S.D.N.Y. 1949) (antitrust decree requiring separation of production and exhibition of motion pictures), aff'd mem. *sub nom. Loew's, Inc.* v. *United States*, 339 U.S. 974 (1950); 15 U.S.C. 1801-1804 (Newspaper Preservation Act); 47 U.S.C. 531 (municipalities may require public access to cable systems); 47 U.S.C. 532 (1988 & Supp. V 1993) (cable systems must set aside channels for leased access); 47 U.S.C. 534, 535 (Supp. V 1993) (cable systems must carry local broadcast stations). See H.R. Rep. No. 934, 98th Cong., 2d Sess. 33 & n.3 (1984) (placing telephone-cable cross-ownership rule in line of authority holding that "the government can restrict concentrated ownership of communications media in a locality, in the interest of diversity").

The purposes of Section 533(b) are to prevent anti-competitive practices in the cable industry, and to promote diversity in video programming and transmission outlets. Section 533(b) responds to regulators' experience with the special potential for anti-competitive behavior posed by entry of the LECs, most of which are regulated monopolies within their common carrier service areas, into competitive markets, such as the market for cable services. Because the LECs' telephone operations are generally subject, at least in part, to regulation under cost-of-service principles, the LECs have an incentive to transfer an affiliated cable entity's costs to their monopoly telephone operations and thus to impose those costs on captive consumer-ratepayers without sacrificing telephone service market share. That cost-shifting would, in effect, subsidize the affiliated cable entity with the LECs' monopoly profits. As a result, telephone consumers would suffer rates based on distorted, higher costs, and businesses competing with the affiliated cable entity might wither under unfair competition.[2]

[2] See generally *National Rural Telecom Ass'n* v. *FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993); *California* v. *FCC*, 905 F.2d 1217, 1224, 1226-1228, 1233-1238 (9th Cir. 1990); *United States* v. *Western Elec. Co.*, 900 F.2d 283, 289-290 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990); *Southwestern Bell Corp.* v. *FCC*, 896 F.2d 1378, 1379-1380 (D.C. Cir. 1990); *Illinois Bell Tel. Co.* v. *FCC*, 740 F.2d

A second problem posed by entry of the LECs into the cable industry is the threat of discrimination against competitors. The LECs have had, historically, effective control over the utility poles and conduits that are necessary for the construction and operation of cable systems, and they wield exclusive control over the wires, switching devices, and other transmission facilities that are essential to the transmission of voice, video, and data over the telephone network. Absent effective regulation, the LECs thus have the ability and incentive to discriminate against competing providers of video programming, by making it impossible or expensive for them to transmit their signals to their customers, or by making it difficult for them to maintain and repair their wires as is necessary to ensure adequate quality. Discrimination, like cross-subsidization, could cripple the LECs' competitors in unregulated markets.[3]

465, 472 (7th Cir. 1984); *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1368-1369 (D.D.C. 1981); *In re Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, Report and Order*, 95 F.C.C.2d 1117, 1129-1131 (1983) (*BOC Separation Order*); *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision*, 77 F.C.C.2d 384, 463-464 (1980) (*Computer II*), modified in part on reconsideration, 84 F.C.C.2d 50 (1980), 88 F.C.C.2d 512 (1981), aff'd *sub nom. Computer & Communications Indus. Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983); General Accounting Office, *Telephone Communications: Controlling Cross-Subsidy Between Regulated and Competitive Services* 50 (Oct. 1987) (*First GAO Report*) (C.A. App. 7678); General Accounting Office, *Telecommunications: FCC's Oversight Efforts to Control Cross-Subsidization* 3-4 (Feb. 1993) (*Second GAO Report*) (C.A. App. 8501-8502); Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 Am. Econ. Rev. 1052 (1962); 2 Alfred E. Kahn, *The Economics of Regulation* 49-59 (1988).

[3] See *California* v. *FCC*, 39 F.3d 919, 929-930 (9th Cir. 1994); *California* v. *FCC*, 4 F.3d 1505, 1509-1513 (9th Cir. 1993); *United*

2. Section 533(b) has its origins in regulations issued by the Federal Communications Commission (FCC) in 1970 to address the problem of anti-competitive practices by the LECs in the cable services market. See 47 C.F.R. 64.601 (1971); *In re Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307 (1970) (*1970 FCC Rules*), aff'd *sub nom. General Tel. Co. of Southwest* v. *United States*, 449 F.2d 846 (5th Cir. 1971). Identifying "[t]he central problem" as "the anomalous competitive situation between [cable] systems affiliated with the telephone companies, and those which have no such affiliation," 21 F.C.C.2d at 323, the FCC concluded that "[t]he entry by a telephone company, directly or through an affiliate, into the retailing aspects of [cable] services in the community within which it furnishes communications services can lead to undesirable consequences," including discrimination against unaffiliated cable companies and extension of the LECs' monopoly position over telephone services to the cable services market, *id.* at 324.[4] "[T]o insure against any arbitrary blockage of th[e] gateway," and to preserve "a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities," the FCC determined that "the preservation of such competition will best

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States v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 189-190 (D.D.C. 1982), aff'd mem. *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. at 1352-1355; *BOC Separation Order*, 95 F.C.C.2d at 1134-1135; *Computer II*, 77 F.C.C.2d at 463-464.

[4] The FCC noted that it had received numerous complaints that the LECs had entered into discriminatory arrangements for attachments of coaxial cable to utility poles with affiliated cable service providers, to the exclusion of others who had sought such arrangements on reasonable terms. 21 F.C.C.2d at 324.

be assured by the exclusion of telephone companies in their service areas from engaging in the sale of [cable] service to the viewing public except where no practical alternative exists to make such service available within a particular community." *Id.* at 325.

In 1980, the FCC directed its staff to study several regulatory restrictions on ownership of cable systems, and in November 1981, the Commision's Office of Plans and Policy issued a report recommending that the telephone-cable cross-ownership bar be retained. See *FCC Policy on Cable Ownership: A Staff Report* 141-178 (C.A. App. 6728-6765). The staff report acknowledged that changes in the cable industry made it "no longer appropriate to think of [cable] as an infant," C.A. App. 6729 n.3, but it nonetheless concluded that there were serious disadvantages in cross-ownership, principally in that "telephone companies are regulated exclusive franchise monopolists in their local area," *id.* at 6740. The staff was especially concerned that the telephone companies would cross-subsidize their cable operations, loading costs onto their captive telephone consumer-ratepayers, and the report noted that, because cable and telephone systems may share capital equipment, "allocating shared costs between these capital accounts on the basis of actual cost causation will be difficult or impossible." *Id.* at 6744. The staff did not believe that a regulatory solution, such as a partial separation of the cable and telephone services, would eliminate the danger of cost-shifting. *Id.* at 6754-6757. The staff also could not find a regulatory solution to the problem of discrimination in access to the local exchange network. *Id.* at 6755, 6760-6762, 6763-6764.

3. Congress enacted Section 533(b) in the 1984 Cable Act, using language borrowed from the FCC's 1970 regulations. Congress prohibited "any common carrier, subject in whole or in part to subchapter II" of the Communications Act of 1934, from "provid[ing] video programming directly to subscribers in its telephone

service area." 47 U.S.C. 533(b)(1). Congress also prohibited local telephone companies from providing utility pole line space or conduit access to any affiliated cable entity for the purpose of providing video programming directly to the common carrier's subscribers. The legislative history indicates that Congress intended "to codify current FCC rules concerning the provision of video programming over cable systems by common carriers," H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984) (*1984 House Report*), and that Section 533 as a whole was intended "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets," *id.* at 55.

The statute contains several exceptions to the general prohibitions, also derived from the FCC's regulatory regime. Under Section 533(b)(3), local telephone companies may freely provide video programming to their local exchange customers who reside in a "rural area," as defined by the FCC. The LECs may also seek a waiver of the cross-ownership bar for those areas where cable service "demonstrably could not exist" except if provided through a LEC-affiliated entity. 47 U.S.C. 533(b)(4). Finally, Congress authorized the FCC to waive the cross-ownership bar "upon other showing of good cause * * * [and] upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection." *Ibid.*

4. Within a few years of the enactment of Section 533(b), the LECs and others began to urge its repeal.[5]

[5] See, *e.g.*, *Communications Competitiveness and Infrastructure Modernization Act of 1990: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 47-60, 143-158, 168-176 (1990); *Cable Television Regulation (Part 1): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 273-276, 311, 339-342, 398-401, 431-436, 452-463 (1990).

Beginning in 1987, the FCC conducted extensive public inquiry and rulemaking proceedings regarding the costs, benefits, and continued need for the cross-ownership bar.[6] In 1992, as part of its ongoing rulemaking proceedings on the regulation of "video dialtone" services,[7] the FCC recommended to Congress that the cross-ownership bar be replaced with an array of regulatory safeguards to prevent abuses by the LECs if they entered the cable market. See *In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 F.C.C. Rcd 5781, 5847-5851 (1992) (*Video Dialtone Order*), modified in part on reconsideration, 10 F.C.C. Rcd 244 (1994). The FCC did not conclude that the potential for anti-competitive conduct by the LECs had disappeared entirely, but it did conclude that the continued risk was

[6] See *In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Notice of Inquiry*, 2 F.C.C. Rcd 5092 (1987); *In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Inquiry and Notice of Proposed Rulemaking*, 3 F.C.C. Rcd 5849 (1988); *In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, First Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry*, 7 F.C.C. Rcd 300 (1991).

[7] "Video dialtone" is the transmission by telephone companies of video services by means of a system made available to multiple programmers on a common carriage basis. See *In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 F.C.C. Rcd 5781, 5783 (1992), modified in part on reconsideration, 10 F.C.C. Rcd 244 (1994). The FCC has thus far concluded that the LECs should be allowed to offer video dialtone services, but only on a common carriage basis for unaffiliated video programmers. 7 F.C.C. Rcd at 5817; see App. 120a. The FCC is currently considering whether LECs should also be allowed to offer video programming with editorial control from a video dialtone platform. See App. 123a-124a.

outweighed by the potential public interest served by their entry into the cable services market. 7 F.C.C. Rcd at 5849. The FCC stated that, if the LECs were allowed to enter the market for providing video programming, it would subject them to extensive regulation: "[T]he FCC should require that if the benefits exceed the costs, the telephone companies provide video programming through a structurally separated video programming subsidiary; that their video programming be through the video dialtone platform that provides service to multiple programmers; and that the extent of local telephone company-provided programming be limited to a specified percentage of overall capacity." *Id.* at 5847-5848; see *id.* at 5850-5851.

Congress, however, declined to repeal the cross-ownership bar. In the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act), Congress revised regulation of the cable television industry to subject it to more vigorous competition. See 47 U.S.C. 541(a)(1) (Supp. V 1993) (prohibiting exclusive cable franchises); 47 U.S.C. 543 (Supp. V 1993) (requiring cable rate regulation in areas where there is no effective competition); 47 U.S.C. 533(a)(2) (Supp. V 1993) (adopting cross-ownership rules for new wireless broadcast technologies). By those measures, Congress sought to promote "a substantial governmental and First Amendment interest in promoting a diversity of views." 1992 Cable Act, § 2(a)(6), 106 Stat. 1461. But after extensive consideration of the arguments in favor of and against the telephone-cable cross-ownership bar, and several proposals (including those of the FCC and the Department of Justice) to replace the bar with a regulatory approach to the problems of cross-subsidization and discrimination, Congress left the cross-ownership bar in place.[8] The Sen-

[8] See note 5, *supra*; see also *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of*

ate report accompanying the 1992 Cable Act expressed the view that cross-ownership restrictions like Section 533(b) "enhance competition." S. Rep. No. 92, 102d Cong., 1st Sess. 46-47 (1991) (*1991 Senate Report*); see also S. Rep. No. 456, 101st Cong., 2d Sess. 9 (1990) (*1990 Senate Report*) ("[B]ecause of concerns about the potential for anticompetitive practices by telephone companies and the need to ensure media diversity, the Committee is not now prepared to permit telephone companies to own or control video programming.").

5. Respondents then brought this action in district court, challenging the constitutionality of Section 533(b). Respondents (or their corporate affiliates) provide local exchange telephone services in six States and the District of Columbia, and they desire to provide video programming directly to their subscribers in Alexandria, Virginia, which is within their telephone service area. App. 54a.

The district court granted summary judgment for respondents, applying an "intermediate level of scrutiny" as set forth in *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), which requires that a content-neutral regulation of speech be "narrowly tailored to serve a significant governmental interest" and "leav[e] open ample alternative channels for communication" to pass constitutional muster. See App. 94a.[9] The district court found "little

the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. 122-123, 226-227, 524-537, 605-616 (1991); *Cable-Instructional TV and S. 1200, Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 2d Sess. 48, 51, 54-55, 95, 96-109, 139-146 (1992); 138 Cong. Rec. S16,663, S16,665-S16,666 (daily ed. Oct. 5, 1992); *id.* at S14,225, S14,237, S14,246-S14,247, S14,250, S14,255-S14,256 (daily ed. Sept. 21, 1992); *id.* at H8671, H8673 (daily ed. Sept. 17, 1992); *id.* at H6489, H6492 (daily ed. July 23, 1992).

[9] The district court rejected both the government's argument that Section 533(b) should be subject to "rationality review," App. 71a-82a, and respondents' contention that the cross-ownership bar required strict scrutiny, *id.* at 82a-93a.

doubt that the statute leaves open ample alternative channels for communication," since respondents may, *inter alia*, communicate with subscribers by producing video programming and marketing it to broadcasters and cable operators; thus, it noted, respondents "are by no means 'silenced'" by the cross-ownership bar. *Ibid.*

The district court concluded, however, that Section 533(b) is not narrowly tailored to serve a governmental interest of promoting diversity in communications outlets because, in its view, there was a lack of fit between the statute and the objectives of preventing discrimination and cross-subsidization by the LECs. App. 102a. While the court accepted, *arguendo*, that regulatory controls would be insufficient to prevent the LECs from cross-subsidizing their affiliated cable entities (*id.* at 106a), it observed that, notwithstanding Section 533(b), the LECs are permitted to operate services for *transport* of video programming if they do not also exercise control or discretion over the transported programming, and the court suggested that the same dangers of discrimination and cross-subsidization are present in that permitted situation (*id.* at 101a-102a). The court rejected the government's contention that the LECs' incentives to engage in anti-competitive practices are greatly increased if they also are allowed to control the content of video *programming*, on the basis that the government had not shown that regulation would be ineffective to control anti-competitive practices by the LECs in the video *programming* market. *Id.* at 103a-104a.

6. The court of appeals affirmed. App. 1a-52a. The court of appeals held that Section 533(b) should be subject to intermediate scrutiny because it is not content-based (*id.* at 28a), is not intended to regulate or prohibit any speech because of the message that it conveys (*id.* at 31a-32a), and is "justified entirely by the peculiar eco-

nomic and physical characteristics inherent in the provision of cable service" (*id.* at 34a).[10] Applying intermediate scrutiny, the court agreed with the government that the interests served by Section 533(b), promoting diversity of media outlets and restricting discrimination and cross-subsidization, were significant. *Id.* at 38a-39a. The court concluded, however, that the statute is not narrowly tailored. In reaching that conclusion, the court remarked that, because the statute contains no specific factual findings about the need for the particular measure enacted, it owed no deference to Congress's judgment on the question of narrow tailoring. *Id.* at 40a-41a.

The court of appeals rejected the government's arguments based on the threat of discrimination by the LECs against competitors in access to essential facilities for the construction and maintenance of cable systems and dissemination of their video programming, reasoning that Congress could simply prohibit such discrimination rather than banning the LECs from offering cable services. App. 42a. On the cross-subsidization point, the court assumed that regulatory oversight would be insufficient to prevent that abuse in the video transport market, and that the possibility of domination of the video programming market as well would give the LECs an incentive for anticompetitive practices in video transport. *Id.* at 44a-45a. The court faulted both Congress and the FCC, however, for failing to devote attention to the possibility of more narrowly tailored regulatory schemes that might achieve the government's substantial interests. *Id.* at 45a-47a. And the court found dispositive its perception that an "obvious less-burdensome alternative" to Section 533(b)

[10] The court of appeals thus rejected respondents' arguments for application of strict scrutiny (App. 37a) and the government's arguments for "minimal scrutiny" (*id.* at 20a-23a). Judge Michael declined to join the panel's rejection of strict scrutiny; he believed that, since the statute failed intermediate scrutiny, the question whether strict scrutiny should be applied was "academic." *Id.* at 52a.

existed, namely, that Congress could limit the LECs' editorial control over video programming on any cable system to a fixed percentage of the available channels and could require them to lease the balance of channels to unaffiliated programmers on a common-carrier basis. *Id.* at 47a-48a.[11]

7. On January 20, 1995, the FCC issued, as part of its video dialtone rulemaking proceedings, a notice of proposed rulemaking addressing its authority, under the "good cause" waiver provision of Section 533(b)(4) (see p. 7, *supra*), to waive the cross-ownership bar for the purpose of more narrowly tailoring the operation of Section 533(b) and avoiding the constitutional difficulties in the statute. See App. 148a-152a. The FCC offered the tentative conclusion that it had authority to waive the bar to obviate potential constitutional difficulties with Section 533(b), and, in particular, that "good cause," which is "commonly interpreted to include changed circumstances," could be interpreted to cover the dramatically changed conditions in the cable industry since 1970, when the cross-ownership rule was first instituted. *Id.* at 149a. The FCC solicited comments on those conclusions.

Noting also that Section 533(b)(4) gives it authority to waive the bar in "particular circumstances * * * taking into account the policy" of the statute, the FCC indicated that it would not waive the cross-ownership bar altogether, but would do so in circumstances that would promote competition. App. 149a. The FCC suggested that it

[11] Unlike the district court, the court of appeals concluded that Section 533(b) did not leave open alternative channels for communication by the LECs. App. 49a-51a. Although the court recognized that LECs may freely arrange for their video programming to be distributed by unaffiliated broadcast and cable operators, it held the statute invalid because the LECs "cannot *guarantee* that video programming they wish to transmit to their local audience via cable television * * * will reach their desired audience." *Id.* at 50a (emphasis added).

would not permit the LECs to purchase cable operators that do not currently face competition in their service areas, but that it would permit the LECs to "establish video dialtone systems that will compete with existing cable operators, thus providing consumers with a choice of multi-channel video systems." *Ibid.* The FCC also requested comments on the constitutionality of various regulatory safeguards, including those suggested by the court of appeals in this case, such as limiting the LECs' editorial control over programming to a fixed percentage of the channels and requiring the LECs to lease the remaining channels to unaffiliated programmers on a common carriage basis. *Id.* at 151a-152a.

8. Congress is also reexamining the cross-ownership bar at this time. Last year, the House of Representatives passed comprehensive telecommunications legislation that, among other things, would have allowed the LECs to provide cable television service within their telephone service areas, if they certified to the FCC that they had complied with regulations that the FCC was to prescribe. See 140 Cong. Rec. H5222 (daily ed. June 28, 1994).[12] The Senate Committee on Commerce, Science, and Transportation reported a communications bill (S. 1822) that would have preempted laws creating local telephone service monopolies and would have allowed the LECs to offer cable television service within their service areas, upon certifying compliance with FCC regulations; no action was taken by the full Senate. See S. Rep. No. 367, 103d Cong., 2d Sess. 21, 90-91, 185-187 (1994). This year, legislation authorizing the LECs to offer video programming in their service areas, subject to regulatory oversight, has been introduced in both the House and the Senate. See H.R. 1555, § 201, 104th Cong., 1st Sess.

[12] The amendment of Section 533(b) passed the House as part of H.R. 3636, but that bill was later redesignated as part of a related bill, H.R. 3626, which also passed the House on the same day. See 140 Cong. Rec. H5246-H5248 (daily ed. June 28, 1994).

(1995); 141 Cong. Rec. H4522, H4545 (daily ed. May 3, 1995); S. 652, § 203, 104th Cong., 1st Sess. (1995); S. Rep. No. 23, 104th Cong., 1st Sess. 9, 50-52, 54 (1995) (typescript ed.); 141 Cong. Rec. S4924 (daily ed. Mar. 30, 1995).

REASONS FOR GRANTING THE PETITION

1. Certiorari is warranted in this case to review "the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965); see *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993). This case presents a particularly strong circumstance for issuance of the writ, because the statute invalidated, 47 U.S.C. 533(b), is part of a commercially significant regulatory scheme, and it was recently retained by Congress after intense debate over the policy of the cross-ownership bar. Moreover, the court of appeals' decision exaggerates the impairment of speech effected by the bar, and it could seriously constrain the flexibility of Congress and the FCC in devising a regulatory regime for the future of the telecommunications sector, which is undergoing a technological revolution and is again the subject of vigorous debate in Congress.

Moreover, a major development since the issuance of the decision below may alter the operation of the statute and the general legal landscape, and may make further consideration of the case by the court of appeals appropriate before this Court undertakes to review the constitutionality of the statute. On January 20, 1995, after the court of appeals denied rehearing, the FCC issued a notice of proposed rulemaking (NPRM), in which it tentatively concluded that 47 U.S.C. 533(b)(4), which provides that the FCC may waive the cross-ownership bar on a showing of "good cause," provides grounds for allowing local telephone companies to provide video programming directly to their customers, if that service is subject to regulatory controls against cross-subsidization

and discrimination. App. 149a. The FCC suggested that, under the statutory good-cause provision, it would not waive the bar where doing so would not promote competition, such as where "telephone companies [would merely] purchase cable companies that do not face competition," but it would waive the bar where doing so would permit telephone companies to "compete with existing cable operators, thus providing consumers with a choice of multi-channel video systems." *Ibid.*

Although the FCC has not yet issued a final rule on the waiver provision, it may do so within a few weeks, before the Court decides whether to grant the petition for a writ of certiorari. If the FCC adopts its proposed reading of its waiver authority, that action would substantially change the constitutional questions presented for review in this case. When combined with the proposed reading of the FCC's waiver authority, the cross-ownership restriction would be much more narrowly tailored; it would no longer operate as an exclusion of the LECs from the provision of video programming in their service areas, but would permit their entry into that market on a competitive basis.

The court of appeals' main criticism of Section 533(b) was that a flat exclusion of LECs from cable services was not sufficiently narrowly tailored to advance the concededly significant governmental interests of promoting competition and diversity in cable services. That court may take a different view of the constitutionality of the statute, if the FCC authorizes the LECs to provide video programming to subscribers in their service areas under certain circumstances. Because the court of appeals' views on the operation and constitutionality of the statute as modified by the FCC's interpretation of its waiver authority may be helpful to this Court, the Court may deem it appropriate to vacate the judgment below and remand the case to the court of appeals for further consideration in light of the FCC's rule. See, *e.g.*, *Bureau of Economic*

Analysis v. *Long*, 454 U.S. 934 (1981).[13] We will keep the Court informed of developments in the FCC's rulemaking.[14]

2. If the Court does not vacate the judgment below and remand for reconsideration, plenary review would be warranted because of the court of appeals' errors in evaluating the constitutionality of the cross-ownership bar. The court of appeals exaggerated the restriction on speech effected by the bar, and it inappropriately substituted its judgment for that of Congress as to whether more narrowly tailored alternatives to the bar would effectively

[13] This suggestion is consistent with the approach taken by the government in four other courts of appeals where constitutional challenges to Section 533(b) are currently pending. In the Ninth Circuit, which declared the statute unconstitutional in two cases, the government has asked the court to reconsider the cases, or to remand them to the district court for reconsideration, in light of the FCC's NPRM. *US West, Inc.* v. *United States*, 48 F.3d 1092 (1995), petition for reh'g pending; *Pacific Telesis Group* v. *United States*, 48 F.3d 1106 (1994), petition for reh'g pending. In the First, Seventh, and Eleventh Circuits, in which the government has appealed from district court orders declaring Section 533(b) unconstitutional, the government has asked the courts to hold the proceedings in abeyance pending completion of the FCC's rulemaking. *NYNEX Corp.* v. *United States*, No. 93-323-P-C (D. Me. Dec. 8, 1994), appeal pending, No. 95-1183 (1st Cir.); *Ameritech Corp.* v. *United States*, 867 F. Supp. 721 (N.D. Ill. 1994), appeal pending, No. 95-1223 (7th Cir.); *BellSouth Corp.* v. *United States*, 868 F. Supp. 1335 (N.D. Ala. 1994), appeal pending, No. 94-7036 (11th Cir.). Section 533(b) has also been declared invalid in *United States Telephone Association* v. *United States*, No. 1:94CV01961 (D.D.C. Feb. 14, 1995), appeal pending, No. 95-1175 (D.C. Cir.); *Southwestern Bell Corp.* v. *United States*, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995); and *Southern New England Telephone Co.* v. *United States*, No. 3:94-CV-80(DJS) (D. Conn. Apr. 27, 1995).

[14] There is, moreover, the possibility that intervening congressional action could render this case moot (see pp. 14-15 & n.12, *supra*), thereby making it appropriate for the Court to enter a *Munsingwear* order vacating the judgment below. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

prevent anti-competitive conduct by the LECs in the market for cable services.

a. The court of appeals observed that a content-neutral regulation of speech must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." App. 38a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). But while a content-neutral regulation must be narrowly tailored to serve the government's legitimate interests, "it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 798-799 (footnote omitted). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, * * * the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800; *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2469-2470 (1994); see *Board of Trustees* v. *Fox*, 492 U.S. 469, 478 (1989) (the Court has been "loath to second-guess the Government's judgment" of narrow tailoring). What narrow tailoring requires in this context is a "'"fit" between the legislature's ends and the means chosen to accomplish those ends,' * * * a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Id.* at 480 (citations omitted).

The cross-ownership bar restricts very little speech, even speech in the form of video programming, of the LECs. The LECs remain free to speak to subscribers in their service areas by a variety of means. The LECs may, for example, operate local television broadcast stations, which would be carried over local cable systems, by virtue of the 1992 Cable Act's must-carry rules. See 47 U.S.C. 534(a) (Supp. V 1993); *Turner Broadcasting*, 114 S. Ct. at 2453. The LECs may produce their own video programming and offer it to local cable operators for transmission. The LECs may also gain access to cable systems for their speech through the "leased access" provisions of the Cable Act. See 47 U.S.C. 532 (1988 & Supp. V 1993).

In addition, the Cable Act does not prohibit LECs from operating direct broadcast satellite systems (which can provide hundreds of channels of video programming) or microwave-based multichannel "wireless cable" systems anywhere in the country, including their own service areas. See *In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report*, 9 F.C.C. Rcd 7442, 7473-7478 (1994); *American Scholastic TV Programming Found.* v. *FCC*, 46 F.3d 1173 (D.C. Cir. 1995). The Cable Act also preserved, for the LECs, the potential for dramatically increased speech opportunities in their service areas and elsewhere through the development of interactive and multimedia services. *Video Dialtone Order*, 7 F.C.C. Rcd at 5788, 5822-5823; see also *1984 House Report* 57. And the Cable Act also does not restrict the LECs from operating traditional cable systems anywhere *outside* their own service areas.

Section 533(b) thus restricts only LEC provision of video programming in the specific situation in which the potential for anti-competitive behavior by the LECs is greatest. While there is no doubt that operation of a multichannel cable system is "speech" protected by the First Amendment, see *Turner Broadcasting*, 114 S. Ct. at 2456, the impairment of LEC speech is nonetheless minimal, for Section 533(b) prevents the LECs only from replicating the editorial arrangement of a cable

operator, and not from offering video programming to the public in many other ways.

b. While the court of appeals accepted that the cross-ownership bar serves the significant interests of preventing cross-subsidization and discrimination by the LECs (App. 38a-39a), it nevertheless held that Section 533(b) violates the First Amendment because, in its view, an "obvious less-burdensome alternative" is available: "Congress could simply limit the [LECs'] editorial control over video programming to a fixed percentage of the channels available; the [LECs] would be required to lease the balance of the channels on a common carrier basis to various video programmers, without regard to content." App. 47a-48a. The matter is not nearly so simple as the court believed, however, and its suggestion represents, not a more narrowly tailored alternative, but a different regulatory regime, profoundly more complex than the one Congress established.

Even if LECs were permitted to enter the cable market in a limited manner as the court of appeals suggested, they could still cross-subsidize their cable operations by transferring costs to their monopoly telephone operations. Their incentive to do so would grow in proportion to the LECs' editorial control over programming carried over the cable system. See C.A. App. 358 (Owen affidavit), 6756 (FCC 1981 staff study: "[T]he higher the level [of LEC control over cable channels], the greater is the danger from telephone monopoly power."). Under the regime proposed by the court of appeals, LEC cross-subsidization could be prevented only through the administration and enforcement of very complex accounting rules requiring separation of the LECs' costs attributable to telephone and cable operations, and additional separation of their costs attributable to those portions of the cable system over which LECs did, and did not, maintain editorial control. The enforcement of accounting rules that might effectively prevent cross-

subsidization, including the continual auditing necessary to prevent evasion of those rules, would require substantial dedication of administrative resources. Indeed, the court of appeals accepted, *arguendo*, that accounting safeguards would not be sufficient to prevent cross-subsidization by the LECs (App. 45a), and its suggestion that the LECs be restricted to control of only a share of a multichannel cable system only magnifies the problem.

Whether or not it is possible to develop accounting rules effective to prevent cross-subsidization, the question for the courts is whether Congress acted *reasonably* in concluding that a simple bar on LEC ownership of cable systems would prevent the well-known problem of cross-subsidization more effectively. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 539 (1987); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 294, 299 (1984). Given the complexity of the regulatory task necessary to prevent cross-subsidization, the inherent subjectivity of cost accounting issues raised by such regulation, the ongoing possibility of evasion of accounting rules, and the need for substantial auditing resources sufficient to prevent evasion, Congress's decision was surely reasonable. When Congress enacted the 1984 Cable Act, it was aware, of course, of the antitrust suit leading to the breakup of the Bell System, in which cross-subsidization by Bell-affiliated LECs had been a principal issue, and in which the court held that complete exclusion of those LECs from certain lines of business was necessary to prevent anti-competitive conduct by them.[15] Moreover, the 1970 FCC rules that Congress codified were promulgated after cable companies complained to the FCC that LECs could cross-subsidize their cable operations with telephone revenues, 21

[15] See *1984 House Report* 32-33; *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. at 1368-1369; *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. at 188-191.

F.C.C.2d at 311; and the 1981 FCC staff report recommending retention of the bar concluded that accounting rules were not sufficient to prevent cost-shifting, C.A. App. 6744-6745.

Congress's decision not to repeal the bar was also reasonable. Before the passage of the 1992 Cable Act, the General Accounting Office (GAO) had warned Congress of difficulties in containing cross-subsidization of new lines of business by LECs. See *First GAO Report*, note 2, *supra*. Congress heard testimony from parties opposing repeal of the bar that regulation could not effectively prevent the LECs from engaging in anticompetitive behavior, and that entry of the LECs into the cable services market would exacerbate structural problems with that market.[16] Those interests also brought to Congress's attention the GAO Report and court decisions calling into question the efficacy of alternative safe-

[16] *Cable-Instructional TV and S. 1200, Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 2d Sess. 115-139 (1992); *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 206-211, 538-602, 617-635, 699-704, 727-745 (1991); *Communications Competitiveness and Infrastructure Modernization Act of 1990: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 61-84, 89-125, 126-134, 177-194 (1990); *Cable TV Consumer Protection Act of 1989: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 238-239, 341-355, 559-560 (1990); *Cable Television Regulation (Part 1): Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 436-451, 464-474 (1990); *Cable Television Regulation (Part 2): Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 98-99, 114-121 (1990).

guards.[17] The Senate Commerce Committee, which in 1990 examined in detail the arguments for and against repeal of Section 533(b), concluded it "could not at the present time support repeal[,] * * * because of concerns about the potential for anticompetitive practices by telephone companies and the need to ensure media diversity." *1990 Senate Report* 8-9; see also *1991 Senate Report* 46-47. During the floor debates on the 1992 Act, proponents of repealing Section 533(b) also presented the case against the bar.[18] Congress nevertheless was not willing to risk the adverse consequences of LEC entry into the cable services market.[19]

[17] *Cable Television Regulation: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 633, 743 (1991); *Communications Competitiveness and Infrastructure Modernization Act of 1990: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 62, 69, 96-97, 119-120 (1990).

[18] See, *e.g.*, 138 Cong. Rec. S16,663, S16,665-S16,666 (daily ed. Oct. 5, 1992); *id.* at S14,225, S14,237, S14,246-S14,247, S14,250, S14,255-S14,256 (daily ed. Sept. 21, 1992); *id.* at H8671, H8673 (daily ed. Sept. 17, 1992); *id.* at H6489, H6492 (daily ed. July 23, 1992).

[19] The court of appeals dismissed the arguments against repeal of the bar that were presented to Congress after the enactment of the 1984 Cable Act, reasoning that "[f]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" App. 46a n.32. That statement demonstrates that the court of appeals confused the tasks of statutory construction and constitutional adjudication. In First Amendment cases like this one, the question for the courts is whether the regulation of speech is reasonably necessary to advance any significant interest of the government, not whether the enacting Congress expressly found it to be necessary. "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting*, 114 S. Ct. at 2471 (opinion of Kennedy, J.). Thus, in arguing that a regulation is narrowly tailored, the government may rely on evidence and arguments that

c. The cross-ownership bar prevents the LECs from misusing their control over the telephone poles and conduits necessary for the construction and operation of cable systems to discriminate against unaffiliated, competitor cable operators in access, price, and quality. See *1970 FCC Rules*, 21 F.C.C.2d at 324. It also prevents them from similarly misusing their control over the local exchange network, which will be crucial as the telephone companies develop video dialtone as a means of disseminating video programming to the public. See *Video Dialtone Order*, 7 F.C.C. Rcd at 5796-5798, 5827. The court of appeals rejected the government's interest in preventing discrimination as a justification for the bar, reasoning that Congress could pass legislation to prohibit discrimination by the LECs. App. 42a.

Passing a law or promulgating a regulation prohibiting discrimination is not the same thing as effectively preventing it, however. Even if Congress did by law prohibit discrimination by the LECs, the LECs' physical control over the poles, wires, and network supporting telephone and cable systems would still give them great power over

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were not presented to the enacting Congress, just as it may advance interests to support a regulation of speech that were not considered when the regulation was enacted. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 70-71 (1983); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978).

The court also refused to defer to Congress's predictive judgment that the cross-ownership bar was necessary to prevent cross-subsidization and discrimination, stating that, "[i]n the context of intermediate scrutiny, we owe deference to the Congress only to the extent that it makes factual findings regarding the need for the particular measure enacted." App. 40a. This Court has never stated, however, that Congress's predictive judgments that form the predicate for legislation deserve deference only when they are codified in a statute or made express in committee reports. See *Turner Broadcasting*, 114 S. Ct. at 2471 (opinion of Kennedy, J.); *Ward* v. *Rock Against Racism*, 491 U.S. at 800; cf. *Columbia Broadcasting Sys.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

unaffiliated cable operators that could be abused. For example, a typical licensing agreement between respondents' Virginia LEC and a cable carrier granting access to the LEC's poles and conduits gives the telephone company discretion to determine whether space is available on a pole and conduit system for cable attachments, to refuse access if it would interfere with the quality of telephone communications or other utility facilities already in place, and to decide exactly where cable attachments should be placed. The cable operator is also required to obtain the LEC's permission to carry out maintenance of the cable attachments. C.A. App. 7539-7542. By those and similar provisions, facially proper to maintain the quality of the LECs' telecommunications facilities, the LECs could frustrate competitors' ability to reach their customers and to keep their plant adequately maintained even if access is granted.

While a law prohibiting discrimination might declare such practices illegal, it could be difficult for competitors or the government to prove that the LECs had abused their control over telecommunications facilities in any particular case, and an extensive supervisory administration would be necessary to police the LECs' behavior in granting access to the network, or to poles and conduit space. But the bar on LEC ownership of cable systems in their service area is completely effective in preventing discrimination; by excluding LECs from the local cable market, it removes their incentive to discriminate against competitors in the cable business. Although, again, it may be possible to conceive of less restrictive approaches to the problem of discrimination, those methods have such disadvantages that it was reasonable for Congress to choose the cross-ownership bar instead. See *Ward*, 491 U.S. at 800.

d. The court of appeals also held Section 533(b) unconstitutional because it does not leave open "ample alternative channels for communication." App. 49a. The

court of appeals reached that conclusion because, it stated, "[t]he statute bars absolutely the [LECs] from entering, with editorial discretion, the [local exchange area] cable television market," and "the [LECs] cannot guarantee that video programming they wish to transmit * * * will reach their desired audience." *Id.* at 50a.

As we have explained, however (pp. 18-20, *supra*), the cross-ownership bar restricts very little speech of the LECs, who are free to disseminate video messages, with editorial control, to the public on broadcast television stations, cable channels carried on unaffiliated cable operators' systems, leased access channels on local cable systems, direct broadcast satellite systems, and microwave "wireless cable" systems, and also by general public distribution of videotaped messages—all methods that present no potential for anti-competitive abuse. In addition, LECs may disseminate video programming outside their telephone service areas by any method that modern technology provides, including operation of cable facilities, and they may also speak to the public freely by means other than video programming. There is therefore no "barrier to delivering to the media, or to the public by other means" (*Clark*, 468 U.S. at 295), any message that the LECs wish to disseminate, and the bar leaves open "ample alternative modes of communication." *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.[20]

Respectfully submitted.

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[20] For the reasons discussed at pages 15-17, *supra*, the Court may deem it appropriate to defer consideration of this petition until completion of the pertinent ongoing FCC rulemaking proceedings.

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